

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:

DeANGELO CO., INC.,

Bankruptcy Case No. 95-41184

Debtor.

TAMALOU M. WILLIAMS, as
Trustee of the Estate of
DEANGELO CO., INC.,

Plaintiff,

vs.

Adversary Case No. 96-4112

CURT J. REBSTOCK, JR.,

Defendant.

OPINION

This matter having come before the Court on the Trustee's Motion for Summary Judgment filed on August 11, 1997; Response thereto filed by the Defendant on September 16, 1997; and Application to Strike Affidavit of Ronald L. Pallmann filed by the Defendant on August 15, 1997; the Court, having heard arguments of counsel and being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

In order to prevail on a motion for summary judgment, the movant must meet the statutory criteria set forth in Rule 56 of the Federal Rules of Civil Procedure made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7056. Rule 56(c) reads in part:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

F.R.C.P. 56(c); Donald v. Polk Co., 836 F.2d 376 (7th Cir. 1988).

The United States Supreme Court has issued a series of Opinions which encourage the use of summary judgment as a means of disposing of factually unsupported claims. See: Anderson v. Liberty

Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348 (1986). "The primary purpose for granting a summary judgment motion is to avoid unnecessary trials when there is no genuine issue of material fact in dispute." Farries v. Stanadyne/Chicago Div., 832 F.2d 374, 378 (7th Cir. 1987) (quoting Wainwright Bank & Trust Co. v. Railroadmens Federal Savings & Loan Ass'n., 806 F.2d 146, 149 (7th Cir. 1986). The burden is upon the moving party to show that there is no genuine issue of material fact in dispute. Anderson, supra, at 2514. There is no genuine issue for trial if the record, taken as a whole, does not lead a rational trier of fact to find for the non-moving party. See: Matsushita, supra, at 1356. "If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." Anderson, supra, at 2511.

Pursuant to Section 5 of the Uniform Fraudulent Transfer Act of Illinois, found at 740 ILCS 160/5, the trustee must prove that a transfer was made by the debtor corporation that was fraudulent as to creditor at the time of the transfer in that the debtor made the transfer without receiving a reasonably equivalent value in exchange for the transfer. Furthermore, the trustee must prove that the debtor was engaged in, or was about to become engaged in, a business or transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or the transaction; or the debtor intended to incur or believed, or reasonably should have believed, that it would incur debts beyond its ability to pay as they became due.

As for the issue of whether the Debtor Corporation received reasonably equivalent value in exchange for the payments to the Defendant, the Court finds that there is a material factual dispute as to whether the payments made were for repayment of a loan made by the Defendant to the Debtor Corporation or whether those payments were merely for repurchase by the Corporation of the Defendant's stock. The Court finds that this factual dispute may well turn on the credibility of the witnesses, and, as such, the Court finds that this matter is not ripe for summary judgment under Rule 7056 of the Federal Rules of Bankruptcy Procedure.

In addition to the factual dispute that the Court has noted above concerning whether the Debtor

Corporation received reasonably equivalent value in exchange for the payments made to the Defendant, the Court finds that there is also a factual dispute as to whether the Corporation retained reasonably small assets to continue business after the transfers in question. The Court finds that there are two diametrically opposed affidavits by qualified accountants regarding the financial stability of the Corporation following the payments to the Defendant. As such, the Court finds that it is unable to resolve this matter in a summary fashion. This being the case, the Court finds that the Motion for Summary Judgment must be denied.

Also before the Court is a Motion to Strike Affidavit of Ronald L. Pallmann, filed by the Defendant on August 15, 1997. In said Motion to Strike, the Defendant requested that the Court strike the Affidavit of Ronald L. Pallmann as it applied to the Trustee's Motion for Summary Judgment. Having denied the Motion for Summary Judgment, the Court finds that the question as to the Motion to Strike is moot and should be denied as such.

ENTERED: October 3, 1997

/s/ GERALD D. FINES
United States Bankruptcy Judge